

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID N. ARMANI,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,

Defendant.

CASE NO. C14-1175-RSM-MAT

REPORT AND RECOMMENDATION
RE: SOCIAL SECURITY DISABILITY
APPEAL

Plaintiff David N. Armani proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1979.¹ He graduated from college in Lebanon and was trained there as a paramedic, moved to the United States in 2010, and has worked in the United

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 States as a machine operator and a mover. (AR 44-45, 47, 60-61.)

2 Plaintiff protectively filed an application for SSI on February 3, 2012, alleging disability
3 beginning February 1, 2012. (AR 86, 182-88.) His application was denied at the initial level and
4 on reconsideration, and he timely requested a hearing. (AR 111-14, 118-26.)

5 On December 31, 2012, ALJ Ilene Sloan held a hearing, taking testimony from Plaintiff
6 and a vocational expert. (AR 39-85.) On February 13, 2013, the ALJ issued a decision finding
7 Plaintiff not disabled. (AR 19-33.)

8 Plaintiff timely appealed. The Appeals Council denied Plaintiff's request for review after
9 reviewing additional evidence on June 16, 2014 (AR 1-7), making the ALJ's decision the final
10 decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this
11 Court.

12 **JURISDICTION**

13 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

14 **DISCUSSION**

15 The Commissioner follows a five-step sequential evaluation process for determining
16 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
17 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
18 worked after the application date. (AR 21.) At step two, it must be determined whether a
19 claimant suffers from a severe impairment. The ALJ found severe Plaintiff's cervical spine disc
20 herniation at C5-6 and cervicgia. (AR 21-23.) Step three asks whether a claimant's
21 impairments meet or equal a listed impairment. The ALJ found that Plaintiff's impairments did
22 not meet or equal the criteria of a listed impairment. (AR 23.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant demonstrated
2 an inability to perform past relevant work. The ALJ found Plaintiff able to perform light work as
3 defined in 20 C.F.R. § 416.967(b), with the following additional limitations: he can frequently
4 climb ramps and stairs, and occasionally climb ladders, ropes, and scaffolds. He can frequently
5 crouch and occasionally crawl. He can frequently handle and finger bilaterally. He can perform
6 occasional overhead reaching with his left arm. He must avoid concentrated exposure to extreme
7 cold, vibration, and hazards. (AR 23-30.) With that assessment, the ALJ found Plaintiff unable
8 to perform his past relevant work. (AR 30-31.)

9 At step five of the sequential evaluation, the burden shifts to the Commissioner to
10 demonstrate that the claimant retains the capacity to make an adjustment to work that exists in
11 significant levels in the national economy. With the assistance of a vocational expert, the ALJ
12 found Plaintiff capable of performing other jobs, such as telephone solicitor, hand packager, and
13 cashier. (AR 31-32.) The ALJ thus found that Plaintiff was not disabled. (AR 32-33.)

14 This Court's review of the ALJ's decision is limited to whether the decision is in
15 accordance with the law and the findings supported by substantial evidence in the record as a
16 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
17 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
18 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747,
19 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the
20 ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954
21 (9th Cir. 2002).

22 Plaintiff argues the ALJ erred (1) at step three in finding that the evidence did not
23 establish that Plaintiff met Listing 1.04C; (2) in discounting Plaintiff's credibility; and (3) in

1 assessing multiple medical opinions. Plaintiff asks that the ALJ's decision be reversed and her
2 claim remanded for an award of benefits or for further proceedings, depending on which errors
3 are found by the Court. The Commissioner argues the ALJ's decision is supported by substantial
4 evidence and should be affirmed.

5 New Evidence

6 Plaintiff's assignments of error depend to some degree on evidence submitted for the first
7 time to the Appeals Council, which was returned to Plaintiff and not incorporated into the
8 administrative record. *See* AR 1-7; Dkt. 12, Exs. 1 & 2. Thus, the Court considers this evidence
9 under sentence six of 42 U.S.C. § 405(g), to determine whether the new evidence is material to
10 the relevant period, whether there is a reasonable possibility that the new evidence would have
11 changed the ALJ's decision, and whether there is good cause for Plaintiff's not submitting the
12 evidence earlier.² *See Mayes v. Massanari*, 276 F.3d 453, 462 (9th Cir. 2001); *Booz v. Sec'y of*
13 *Health and Human Servs.*, 734 F.2d 1378, 1380 (9th Cir. 1984).

14 Although the new evidence post-dates the ALJ's decision, it is close in temporal
15 proximity and reflects Plaintiff's ongoing treatment of a condition of traumatic origin that
16 existed during the relevant period. Plaintiff's post-decision test results allowed his providers to
17 compare his condition at that time to test results obtained during the relevant period, and thus at
18 least part of the relevant period is implicated. *See* Dkt. 12, Exs. 1 & 2. Thus, the Court is
19 satisfied that the new evidence relates to the time period before the ALJ and is therefore material.

20 ² Although Plaintiff makes an alternative argument that the Court can evaluate the new evidence
21 under sentence four (Dkt. 20 at 7 n.5), The Appeals Council's "consideration" of evidence is a term of art.
22 *See Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157, 1163 (9th Cir. 2012). The Appeals Council
23 "considers" evidence if that evidence is added to the administrative record, and the evidence here was not
so incorporated. *See Taylor v. Comm'r of Social Sec. Admin.*, 659 F.3d 1228, 1232-33 (9th Cir. 2011).
Accordingly, the new evidence must be evaluated by this Court under the standards applicable to a
sentence-six remand. *See Bustamante v. Colvin*, 2015 WL 136016, at *11-12 (D. Ariz. Jan. 9, 2015).

1 *See Martinez v. Astrue*, 2014 WL 310387, at *19 (N.D. Cal. Jan. 28, 2014).

2 There is also a “reasonable possibility” that the new evidence would have changed the
3 ALJ’s decision, because it may conflict with the ALJ’s interpretation of the medical record, and
4 may affect the ALJ’s step-three findings as well. The ALJ found that the medical record
5 indicated that Plaintiff’s condition was not as severe as alleged (and not as limiting as opined by
6 providers) because his condition improved with conservative treatment and his providers did not
7 find that it warranted surgical intervention. (AR 25-29.) The new evidence suggests that
8 Plaintiff’s condition had not significantly improved, and reveals that his providers ultimately did
9 recommend surgical intervention, shortly after the ALJ’s decision. Dkt. 12, Exs. 1 & 2. Plaintiff
10 underwent surgery in April 2013, and apparently returned to work later than year. Dkt. 12, Exs.
11 1 & 2; Dkt. 12 at 2 n.2.

12 Furthermore, Plaintiff has good cause for not submitting the new evidence earlier,
13 because the evidence consists of treatment notes that post-date the ALJ’s decision, and thus they
14 were not available at an earlier time.

15 Because the new evidence is material and Plaintiff has good cause for not submitting it
16 earlier, the Court concludes that the ALJ should be afforded the opportunity to reconsider her
17 decision in light of the new evidence.

18 CONCLUSION

19 For the reasons set forth above, the Court recommends that this matter should be
20 REVERSED and REMANDED for further proceedings, under sentence six of 42 U.S.C. §
21 405(g).

22 DEADLINE FOR OBJECTIONS

23 Objections to this Report and Recommendation, if any, should be filed with the Clerk and

1 served upon all parties to this suit within **fourteen (14) days** of the date on which this Report and
2 Recommendation is signed. Failure to file objections within the specified time may affect your
3 right to appeal. Objections should be noted for consideration on the District Judge's motions
4 calendar for the third Friday after they are filed. Responses to objections may be filed within
5 **fourteen (14) days** after service of objections. If no timely objections are filed, the matter will
6 be ready for consideration by the District Judge on **June 5, 2015**.

7 DATED this 19th day of May, 2015.

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10 Mary Alice Theiler
11 United States Magistrate Judge
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